80-1231

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GARY "MIKE" GARRISON,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS THE INSTANT APPEAL

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QUESTIONS PRESENTED

I. Whether the decision of the Illinois Supreme Court, remanding appellant's cause for further proceedings, constitutes the "finality" required by 28 U. S. C. § 1257(2).

II. Whether public indecency is a constitutionally protected right under either the First Amendment's guarantee of free speech or under the right of privacy.

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INTRODUCTION

The appellee, People of the State of Illinois, move this Court to dismiss the appeal herein on the grounds that this Court does not have jurisdiction to hear the cause and alternatively that the questions on which the decision of the cause depends are so unsubstantial as not to need review.

JURISDICTION

The jurisdictional requisite of finality as provided in 28 U. S. C. § 1257(2) is not present here. Hence the Court does not have jurisdiction to hear the case. This is discussed, *supra,* under Reasons For Dismissing The Appeal.

STATEMENT OF THE CASE

Appellee adopts appellant's statement of facts but wishes to clarify the charges. Each count in this case alleged that the defendant "while standing behind a storm door, (did) expose his sex organ in a lewd manner to (name of passerby) with intent to arouse his sexual desires."

REASONS FOR GRANTING THE MOTION TO DISMISS

I.

THIS COURT LACKS JURISDICTION TO HEAR THIS CASE AS THE FINALITY REQUIREMENT OF 28 U. S. C. § 1257(2) IS NOT MET.

The appellant seeks to invoke this Court's jurisdiction under 28 U. S. C. § 1257(2). This statute permits discretionary review of state court judgments only when they are "final." 28 U. S. C. § 1257. The appellee submits that the judgment sought to be reviewed here is not a final one within the meaning of 28 U. S. C. § 1257.

In the instant case the appellant successfully argued in the trial court that certain provisions of the Illinois Public Indecency Statute, i.e., Ill. Rev. Stat., ch. 38 §§ 11-9(a)(3) and 11-9(b), were unconstitutional. The State appealed this ruling directly to the Illinois Supreme Court. That court found that the statute was constitutional and reversed the judgment of the circuit court and remanded the cause for further proceedings. Appellant's Appendix A at A-12.

Those proceedings have not yet been held. The appellant has not been tried for the acts charged and presently stands unconvicted. Instead of proceeding to trial the appellant seeks review from this Court for what he terms constitutional questions.

It is fundamental that the final judgment in a criminal proceeding is the sentence and that no appeal lies to this Court until a person is convicted and sentenced. *Parr* v. *United States,* 351 U. S. 513 (1956). This Court has refused to hear many similar criminal appeals because of this lack of finality. *See, e.g., Chapman* v. *California,* 405 U. S. 1020 (1972); *Arcenaux* v. *Louisiana,* 376 U. S. 336 (1964); *Eastman* v. *Ohio,* 299 U. S. 505 (1936). The Court should invoke this long-standing rule and dismiss this appeal because further proceedings remain to be completed in the state court.

The appellant is evidently aware of the finality rule. He argues that certain cases of this Court have created exceptions to the rule and that his case is one such exception. He relies heavily on *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975). In *Cox* this Court allowed an appeal even though there were further proceedings to be heard in the state courts. Because those state proceedings were unrelated to the federal question, this Court felt it should examine a Georgia law which created a conflict between freedom of the press and the right to privacy. The Georgia law had created a civil action wherein a newspaper could be sued for publishing the name of a rape victim.

This Court did accept jurisdiction in *Cox.* The reasons it did so are stated very well by the appellant in his jurisdictional statement at p. 7. The Court felt that should the newspaper succeed at the trial below, then the "important question of freedom of the press under the First Amendment" would go unanswered. This would only have further harmed the operation of a free press as the press would not have known how to properly report the news.

However we are not dealing here with the freedom of the press. We are dealing here with a person accused of exhibiting himself to female passersby with intent to arouse his sexual desires. The appellees find it hard to believe, as appellant posits in his jurisdictional statement at p. 7, that "the Illinois

Public Indecency Statute leaves, not merely the press, but every person in the shadow of criminal sanctions of a statute, the constitutionality of which is in serious doubt."

Cox does not stand for the proposition that the finality requirement is no longer a jurisdictional predicate. *Cox* merely states that the finality requirement is not rigid when it comes to reviewing cases that have great public importance and constitutional ramifications.

The appellant maintains that his case is important because the rights of privacy and freedom of speech are involved. When the appellant exhibited himself to the different women[1] walking by his house, he was standing by the front screen door to his house. He argues that since he was in his house he was entitled to publicly expose himself to people on the sidewalk. The right of privacy has no application to these facts. As to the freedom of speech being involved, appellant evidently thinks that public indecency is a protected First Amendment Right. He cites no cases for this proposition. The appellee can't locate any either.

For the foregoing reasons the appellees request that this appeal be dismissed as the facts of this case do not present an exception to the finality rule.

II.

PUBLIC INDECENCY IS NOT AN ACTIVITY THAT IS PROTECTED UNDER THE FIRST AMENDMENT NOR UNDER THE RIGHT OF PRIVACY.

The appellant prefaces his argument by stating that the Illinois Public Indecency Statute is vague and standardless. Thus he argues that he did not understand that standing by his

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[1] The appellant suggests that he has a right to separate trials for the various times he exposed himself to the public with intent to arouse himself. While this may be true, *see, Ill. Rev. Stat.*, ch. 38, § 114-8, such a course of action is voluntary on his part. It is pure conjecture for the appellant to argue that the State of Illinois will subject him to multiple trials.

front door with his sexual organ exposed while attempting to arouse himself, constituted a "lewd" exposure, as that term is used by the statute.[2] In this regard this Court has stated:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.
>
> On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. * * *

United States v. *Hariss,* 347 U. S. 612 (1954).

As the Illinois Supreme Court pointed out,

> . . . The information charged the defendant with exposing his sex organ, conduct which clearly constitutes a lewd exposure, and he may not pose hypothetical situations in which the statutory standards might conceivably be unconstitutionally vague. . . . Appellant's Appendix at A-11.

These facts do not present a substantial question.

Appellant, in his jurisdictional statement, then goes on to talk about some *obscenity* statutes that have been held unconstitutional. Illinois has both an obscenity statute[3] and a public indecency statute. The Illinois Supreme Court, in its opinion, stated that the public indecency statute "is aimed at public displays which do not involve first amendment rights. Such displays may be prohibited without reference to the constitutional obscenity standard, because they do not involve primarily expressive activities." Appellant's Appendix at A-7. The appellant simply does not raise any substantial question by this line of reasoning as detailed obscenity standards have nothing to do with public indecency.

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[2] Appellant feels that a public indecency statute must contain obscenity guidelines as enunciated by this Court in *Miller* v. *California,* 413 U. S. 15 (1973). Once, again, appellee reiterates that freedom of speech does not encompass public indecency.

[3] This Court upheld the constitutionality of this statute in *Ward* v. *Illinois,* 431 U. S. 767 (1977).

Appellant also argues that since he was standing by his front door when he committed the public indecency, he is protected by the right to privacy. Boiled down to its essentials appellant maintains that his home is his castle and therefore he can do anything he pleases as long as he is within the confines of that castle. Appellant misses the point. He knowingly made his actions visible to the passersby on the sidewalk. This claim does not present a substantial question as his activities are by definition, public, not private.

Appellant further requests that this Court examine the spelling error located in *Ill. Rev. Stat.*, ch. 38, § 11-9(b). At the time appellant exposed himself the Illinois statute defined the term "public place" as "any place where the conduct may reasonably be *excepted* to be viewed by others." *Ill. Rev. Stat.*, ch. 38, § 11-9(b) (1977). Obviously the word "excepted" should have been "expected," but a typing error occurred during the enrolling and engrossing process and passed unnoticed. The Illinois Supreme Court in its opinion found that the Illinois legislature clearly intended to use the word "expected." The original bill containing this section used the word "expected." The committee comments illustrate that this was the intendment. *Ill. Ann. Stat.*, ch. 38, § 11-9, Committee Comments, at 304 (Smith-Hurd 1979). Both of the statutory computations footnote the word "excepted" in the statute and indicate it should probably read "expected." *Ill. Rev. Stat.*, ch. 38, § 9-11(b) (1977); *Ill. Ann. Stat.*, ch. 38, § 11-9(b) (Smith-Hurd 1979). It cannot be said that men of ordinary intelligence would have had to guess at the meaning of public place. For this reason, this typing error does not raise a substantial question.

Lastly the appellant seeks review because the statute does not require the actor to intend that his actions be viewed by others. Appellant overlooks the intent requirement clearly enunciated by the statute. If the actor lewdly exposes himself "with intent to arouse" himself in a public place he commits

public indecency. The State clearly has the power to define the situs or victim[4] of a crime. In this case the crime can only be committed in a public place. (That is why there is no privacy argument here).

No constitutional question is presented by the State defining the place where a crime may be committed. This Court should dismiss the appeal.

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[4] For example Illinois has a misdemeanor statute making it a crime to indecently solicit a child under 13 years of age. *Ill. Rev. Stat.*, ch. 38, § 11-6 (1973). The State does not have to prove that the perpetrator intended his victim to be under 13.

CONCLUSION

Wherefore, appellee respectfully submits that this Court does not have jurisdiction over this case as the "finality" requirement of 28 U. S. C. 1257(2) is not met. In addition this cause presents unsubstantial questions. The appeal should alternatively be dismissed for that reason.

Respectfully submitted,

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